

1 THE HONORABLE ROBERT S. LASNIK
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AVOCENT REDMOND CORP., a
Washington corporation,

Plaintiff,

vs.

ATEN TECHNOLOGY INC., a California
corporation; ATEN INTERNATIONAL
CO., LTD., a Taiwanese Company;
BELKIN INTERNATIONAL, INC., a
Delaware corporation, and BELKIN, INC., a
Delaware corporation,

Defendants.

Case No. 2:06-CV-01711 (RSL)

**DEFENDANTS' MOTION FOR
LEAVE TO AMEND INVALIDITY
CONTENTIONS**

NOTE ON MOTION CALENDAR:
December 16, 2011

1 **I. INTRODUCTION AND RELIEF REQUESTED**

2 Defendants Belkin International, Inc. and Belkin Inc. (“Belkin”) and ATEN
 3 Technology, Inc. and ATEN International Co., Ltd. (“ATEN”; collectively, “Defendants”)
 4 seek leave to amend their June 15, 2007 invalidity contentions to include the prior art others
 5 identified to Plaintiff Avocent Redmond Corp (“Avocent”) in related litigation in 2009 and
 6 2010. The amendment does not prejudice Avocent because Avocent was well aware of this
 7 art and its relevance no later than 2009. Indeed, before the stay in this case was lifted, *all of*
 8 *this art* was disclosed to Avocent in a 2009 expert report on the invalidity of Avocent’s
 9 asserted patents and much of it was the subject of a 2010 motion for summary judgment of
 10 invalidity of the patents in suit.¹ Moreover, in a joint submission to the Court, Avocent
 11 previously proposed a January 25, 2012 due date for Defendants to provide final invalidity
 12 contentions. Thus, far from being untimely or prejudicial, Defendants are seeking leave to
 13 amend almost two months *before* the date which Avocent previously proposed was
 14 reasonable.

15 **II. FACTS**

16 This was first filed against Rose Electric, Inc. and Rose Electronics (the “Rose
 17 Defendants”) on November 27, 2006.² The only Defendants named in the initial complaint
 18 were the Rose Defendants,³ who were represented by separate counsel and have since settled
 19 with Avocent.

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21 ¹ The prior art Defendants seek to rely on was identified to Avocent in the pleadings from
 22 *Avocent Redmond Corp. v. United States & Rose Electronics* (Intervenor), No. 08-69C (Ct.
 23 of Fed. Cl. Jan. 31, 2008) (“Rose II litigation”). Specifically, Defendants seek to incorporate
 24 the prior art invalidity contentions set forth in the following pleadings from that litigation:

25 1) the Expert Report of Steven Eisenbarth, Ph.D. PE (including the invalidity
 26 claim charts attached as Exhibits thereto) served on Avocent on November 23, 2009 by
 27 Defendant Rose Electronics, and

28 2) Rose Electronics’ Motion for Summary Judgment of Invalidity of All 17
 29 Claims Asserted Against the ServeView Pro Product Based on 35 U.S.C. § 102(g), filed
 30 under seal on April 29, 2010 in the *Rose II litigation* and exhibits and supporting documents
 31 thereto, and Reply briefs thereon.

2 ² See Docket No. 1.

3 ³ See *Id.*

1 On January 17, 2007, Avocent amended its Complaint to allege infringement of three
 2 patents by ATEN and Belkin.⁴ Belkin answered Avocent's amended complaint on February
 3 22, 2007.⁵ ATEN answered on April 9, 2007.⁶ Avocent served its preliminary infringement
 4 contentions on May 25, 2007 and Defendants served their preliminary invalidity contentions
 5 on June 15, 2007.⁷ Avocent asserted over 50 claims from the three patents in suit and
 6 accused of infringement dozens of Belkin and ATEN products spanning numerous product
 7 lines and families.⁸ Avocent's asserted patents belong to a much larger family of U.S. and
 8 foreign patents and applications, which collectively have extensive prosecution histories with
 9 hundreds of prior art references cited.⁹ At least three of these Avocent patents had been
 10 asserted in several prior infringement actions in this Court and elsewhere, including the
 11 Southern District of New York, and the Court of Appeals for the Federal Circuit.¹⁰

12 On October 30, 2007, this Court stayed the case immediately before the claim
 13 construction hearing, and the stay remained in effect until August 2011. During the four-year
 14 stay, Avocent filed two additional infringement actions asserting the same patents it asserted
 15 against Belkin and ATEN as well as additional patents in the family: (1) *Avocent Redmond*
 16 *Corp. v. United States & Rose Electronics (Intervenor)*, No. 08-69C (Ct. of Fed. Cl. Jan. 31,
 17 2008) ("Rose II litigation"); and (2) *Avocent Redmond Corp. v. Raritan Americas, Inc.*, No.
 18 10-CV-6100 (S.D.N.Y Aug. 14, 2010) ("Raritan II litigation").¹¹ In addition, the United
 19 States Patent Office ("USPTO") declared eight separate reexamination proceedings
 20 concerning the patents-in-suit, relying on previously-undisclosed prior art references and

22 ⁴ See Docket No. 11.

23 ⁵ See Docket No. 40.

24 ⁶ See Docket No. 60-61.

25 ⁷ See Docket No 78.

26 ⁸ See Docket No 148 (filed Under Seal).

27 ⁹ Declaration of Yasser El-Gamal in Support of Defendants' Motion for Leave to Amend
 28 Invalidity Contentions ("El-Gamal Decl."), ¶ 15-17.

¹⁰ El-Gamal Decl., ¶ 19.

¹¹ El-Gamal Decl., ¶ 20.

1 prior art combinations.¹² Since the stay was lifted, Avocent has accused of infringement
 2 many more of Defendants' products, on top of the dozens of products initially accused.

3 Defendants' proposed amendment to their invalidity contentions¹³ merely seeks to
 4 incorporate what was already disclosed and highlighted in these intervening reexaminations
 5 and in the *Rose II* litigation. Specifically, Defendants' contentions seek to incorporate the
 6 prior art invalidity contentions set forth in: (1) the Expert Report of Steven Eisenbath, Ph.D.
 7 PE (including the invalidity claim charts attached as Exhibits thereto) served on Avocent on
 8 November 23, 2009 by Defendant Rose Electronics in the *Rose II* litigation¹⁴ and; (2) the
 9 briefing relating to the Rose Electronics' Motion for Summary Judgment of Invalidity of All
 10 17 Claims Asserted Against the ServeView Pro Product Based on 35 U.S.C. § 102(g), filed
 11 under seal on April 29, 2010 in the *Rose II* litigation, as well as the supporting briefs and
 12 pleadings.¹⁵ This prior art information, including invalidity positions, was disclosed to
 13 Avocent by November 2009, and was not known or fully appreciated by ATEN and Belkin
 14 until after this case was stayed in October 2007.¹⁶ Indeed, the activities, events and
 15 documents that evidenced the prior invention of Rose's OSD product, which constitutes prior
 16 invention defense under 35 U.S.C. § 102(g), was private information of Rose Electronics and
 17 unavailable to ATEN or Belkin prior to the stay.¹⁷

18 Avocent also contemplated, as evidenced by the August 24, 2011 Joint Submission
 19 Regarding Case Schedule, that Defendants would supplement their "Invalidity Contentions"
 20 – proposing a January 25, 2012 due date for Final Invalidity Contentions.¹⁸ Notwithstanding

21 ¹² El-Gamal Decl., ¶ 18.

22 ¹³ Defendants' proposed First Supplemental Combined Statement of Preliminary Invalidity
 23 Contentions (excluding Appendix C and D) is attached in redline format. El-Gamal Decl.,
 Ex. 1.

24 ¹⁴ El-Gamal Decl., Ex. 2.

25 ¹⁵ El-Gamal Decl., Ex. 3.

26 ¹⁶ See Declaration of Vision Winter in Support of Defendants' Motion for Leave to Amend
 27 Invalidity Contentions ("Winter Decl."), ¶ 4; Declaration of Ming Yang in Support of
 Defendants' Motion for Leave to Amend Invalidity Contentions ("Yang Decl."), ¶ 2. El-
 Gamal Decl., ¶ 21.

28 ¹⁷ Winter Decl., ¶ 11; Yang Decl., ¶ 3.

¹⁸ Docket No. 248 at 2:10-12.

1 the foregoing, Avocent has nevertheless stated that it would oppose this motion, suggesting
 2 that the fact Rose was a co-defendant with ATEN and Belkin somehow prevents them from
 3 showing of “good cause.” Specifically, Avocent’s counsel took the position:

4 I write in response to your letter of November 3, 2011. The defendants were
 5 required to disclose their invalidity contentions regarding the patents-in-suit
 6 no later than June 15, 2007. The rose, Belkin and ATEN defendants all
 7 worked together and presented their “Joint Invalidity Contentions” on that
 8 date. It is our understanding that the defendants can interject new invalidity
 9 contentions into the case *only* upon the showing of good cause. The fact
 10 that the prior art that exists today is the same as the prior art that existed in
 2007 makes that showing difficult. This is especially true of Roses alleged
 102(g) invalidity defense. Rose was a party to this litigation and worked
 11 jointly with Aten and Belkin to create the defendants’ Joint Invalidity
 12 Contentions. Avocent believes that the parties must show good cause for
 13 adding new contentions in this case and will oppose the remaining defendants’
 14 efforts to add new invalidity contentions at this point.¹⁹

11 **III. DEFENDANTS SHOULD BE GRANTED LEAVE TO AMEND.**

12 Under the prior governing scheduling order the parties could freely update their
 13 respective infringement and invalidity contentions through September 24, 2007, the
 14 beginning of the claim construction phase.²⁰ Thereafter, the parties would need to make a
 15 “good cause” showing.²¹ The patent local rules also allow for amendments upon a showing
 16 of “good cause.”²² Federal courts recognize a “strong federal policy” in challenging invalid
 17 patents and therefore “permitting full and free competition in the use of ideas which are in
 18 reality a part of the public domain.” *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969). Under the
 19 Local Patent Rules, examples of good cause expressly includes “(b) *recent discovery of*
 20 *material prior art despite earlier diligent search.*”²³

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 22 ¹⁹ El-Gamal Decl., Ex. 4.

23 ²⁰ Docket No. 78.

24 ²¹ Because of the four-year stay, the parties have agreed and the Court has ordered that claim
 25 construction briefing be supplemented by December 16, 2011. Docket No. 248 and 262.

26 ²² The Local Patent Rules apply to cases filed after January 1, 2009 or to any pending case in
 27 which the Rule 26(f) discovery conference has not taken place. Avocent filed this case
 before January 1, 2009 and the Court held its Rule 26(f) conference on March 29, 2007.
 Accordingly, the Local Patent Rules appear inapplicable. Nonetheless, the examples set
 forth therein that justify amendments to invalidity contentions provides guidance to the
 “good cause” analysis.

28 ²³ Local Pat. R. 124.

1 **A. Defendants Have Good Cause To Amend Their Invalidity Contentions.**

2 Defendants' proposed supplemental invalidity contentions²⁴ merely seek to
 3 incorporate newly discovered prior art references and combinations identified in Avocent's
 4 reexaminations and litigations that occurred *after* the October 30, 2007 stay of this case.²⁵
 5 This prior art was not known or appreciated by ATEN or Belkin prior to the stay, and was
 6 largely developed in connection with the *Rose II* litigation filed in 2008 after this case was
 7 stayed.²⁶

8 Even though all of this art was *specifically disclosed* to Avocent in the *Rose II*
 9 litigation no later than November 2009,²⁷ Avocent has nevertheless stated that it will oppose
 10 this motion. Avocent's position seems to be that that ATEN and Belkin were somehow not
 11 diligent in discovering this information because some or all of it was in the possession of
 12 their former co-defendant, Rose. This position has no merit and is directly contrary to
 13 governing law and the Local Patent Rules, which recognize that recent discovery of prior art
 14 despite earlier diligent search constitutes good cause to supplement. Furthermore, neither
 15 Rose nor its attorneys disclosed the existence or significance of Rose's prior development
 16 efforts relating to this art prior to the stay.²⁸ Rose itself apparently did not know this art
 17 defense until after this case was stayed.²⁹

18 ²⁴ El-Gamal Decl., Ex. 1.

19 ²⁵ Defendants' supplemental invalidity contentions seek to incorporate the following groups
 of prior art:

- 20 • Rose OSD KVM Product: prior invention under 35 U.S.C. § 102(g) first disclosed
 21 in September 2009 in the Rose II litigation. This prior art, uniquely in Rose's
 22 possession, custody and control, was previously unavailable to Belkin and ATEN;
- 23 • Horiuchi and Ishihara et al.: two Japanese references from a, Japanese counterpart
 24 prosecution file that was not produced to Belkin or ATEN at the time the
 25 Defendants served their Preliminary Invalidity Contentions prior to the stay; and
- 26 • Diefendorff et al., PolyCon, Engelbart, Howse, Tragen/Q-Net: prior art references
 27 first employed during the Rose II litigation and/or in connection with the
 28 intervening reexamination requests developed and filed by Rose. El-Gamal Decl.,
 29 ¶ 22-27.

26 ²⁶ Winter Decl., ¶ 10; Yang Decl., ¶ 2-3. El-Gamal Decl., ¶ 20.

27 ²⁷ El-Gamal Decl., ¶ 23.

28 ²⁸ Winter Decl., ¶ 11; Yang Decl., ¶ 3.

29 ²⁹ El-Gamal Decl., ¶ 25.

1 Nor can Avocent plausibly argue that ATEN and Belkin were not diligent. Prior to
 2 the four-year stay, Belkin and ATEN diligently searched for prior art.³⁰ Their search
 3 included reviewing hundreds of documents cited in the extensive prosecution histories,
 4 requesting prior art searches, reviewing the additional prior art references, propounding
 5 discovery seeking prior art and documents from prior litigations.³¹ *See Halo*, 2010 WL
 6 3489593, at *2 (granting leave to amend where previous prior art search “required an
 7 assessment of activities that occurred over fifteen years ago, ‘tantamount to a lifetime in the
 8 electronics industry’”). The significance of ATEN and Belkin’s undertaking is further
 9 appreciated when placed in the context of Avocent’s broad infringement contentions –
 10 asserting three patents and over 50 claims and accusing dozens of products spanning
 11 numerous product lines and families.³² *See Halo Elecs., Inc. v. Bel Fuse Inc.*, 2010 WL
 12 3489593, at *2 (N.D. Cal. Sept. 3, 2010) (granting leave to amend where defendants had to
 13 evaluate hundreds of accused products, as well as the asserted patent claims and prosecution
 14 histories).

15 The facts clearly show that ATEN and Belkin have good cause to amend: the
 16 supplemental prior art was only recently discovered and despite their diligent efforts, was not
 17 discovered and appreciated prior to the October 30, 2007 stay.

18 **B. There is No Prejudice to Avocent.**

19 Avocent cannot demonstrate any prejudice from the Defendants’ amended invalidity
 20 contentions for several reasons.

21 First and foremost, there can be no prejudice because the identity and significance of
 22 each of the supplemental prior art references has been well known to Avocent since at least
 23 the November 2009 Expert Report served by the Defendants in the *Rose II* litigation.
 24 Moreover, much of the supplemental prior art formed the basis for the 2010 Motion for
 25 Summary Judgment of Invalidity filed in the *Rose II* litigation. Thus, none of the prior art is

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³⁰ Winter Decl., ¶ 7-9, 12-21; Yang Decl., ¶ 1.

27 ³¹ Winter Decl., ¶ 7-9, 12-21; Yang Decl., ¶ 1.

28 ³² Winter Decl., ¶ 9, 18; Yang Decl., ¶ 1.

1 new to Avocent. There is no unfair surprise to Avocent because Defendants' supplemental
 2 invalidity contentions incorporate prior art references and combinations already identified in
 3 the intervening reexaminations before the USPTO and developed by Rose and the United
 4 States in the intervening *Rose II* litigation. Nor will these supplemental contentions create
 5 any additional burden on the Court because Defendants' supplemental contentions will not
 6 affect any pending or previously decided motion.

7 Second, the parties here expressly contemplated supplementation of invalidity
 8 contentions before and after the stay. When serving their preliminary contentions,
 9 Defendants expressly informed Avocent that, "Defendants' discovery and investigation into
 10 the claims and defenses in this action are ongoing and these Preliminary Invalidity
 11 Contentions will be supplemented as Defendants' investigation continues, as new references
 12 are discovered and as the significance of previously discovered references is more fully
 13 appreciated."³³ Moreover, the parties — including Avocent — contemplated supplementation
 14 of invalidity contentions in connection with the stay being lifted a few months ago. The
 15 parties' Joint Submission Regarding Case Schedule provided proposed dates for "Final
 16 Invalidity Contentions" to be served in early 2012.³⁴ Accordingly, Avocent cannot credibly
 17 claim prejudice from an amendment that is taking place well before the date that all parties,
 18 including Avocent, represented to the Court as a reasonable date for supplemental invalidity
 19 contentions.

20 Third, to the extent necessary, Avocent has ample time to take discovery related to
 21 the additional references and invalidity theories set forth in Defendants' supplemental
 22 contentions. Defendants' supplemental contentions come at an early posture in the case
 23 following a 4-year stay of proceedings. This case is still seven months before the close of
 24 fact discovery, five months before opening expert reports are exchanged, and two months
 25
 26

27 ³³ El-Gamal Decl., Ex. 6, at 2.

28 ³⁴ 09/21/11 Amended Order Setting Trial Date & Related Dates (Docket No. 248) at 2.

1 before the claim construction hearing. These are precisely the kinds of circumstances where
 2 courts have found no evidence of prejudice.³⁵

3 Fourth, although not untimely in any event, to the extent Avocent contends these
 4 amendments could have been made even earlier, Avocent is at least partially to blame. When
 5 the Defendants served their preliminary invalidity contentions, Defendants expressly noted
 6 that many of the cited references submitted to the USPTO still remained unavailable and
 7 Avocent had failed to produce allegedly invalidating prior art references uncovered in prior
 8 litigations.³⁶ Avocent's failure to provide that information continues. Counsel for Belkin
 9 and Avocent met and conferred on October 14, 2011 regarding, among other issues,
 10 supplementing invalidity contentions.³⁷ Belkin informed Avocent that the Defendants in this
 11 case had not received any documents relating to the *Raritan II* litigation, documents Avocent
 12 represented it would produce in October and supplement on a regular basis.³⁸ Having not
 13 received these documents (many are relevant to Defendants' invalidity contentions),
 14 Defendants wrote to Avocent on November 3, 10, 14, and 15 regarding Avocent's failure to
 15 respond.³⁹ On November 14, Avocent responded that it would oppose Defendants'

16 ³⁵ See, e.g., *Play Visions, Inc. v. Dollar Tree Stores, Inc.*, Case No. C09-1769, Order
 17 Granting Motion to Amend Preliminary Invalidity Contentions (W.D. Wash. November 30,
 18 2010) (Pechman, J.) ("There is no evidence of prejudice given that the parties have yet to
 19 engage in claims construction and discovery does not end for months."); *Halo Elecs., Inc. v.*
 20 *Bel Fuse Inc.*, 2010 WL 3489593, at *2 (N.D. Cal. Sept. 3, 2010) ("Although the instant
 action was filed in 2007, this matter is still in its relatively early stages. As noted above, the
 case was stayed for nearly eighteen months until November 20, 2009. While the parties have
 begun claim construction activities, the court has not yet held a claim construction hearing or
 set discovery deadlines or a trial date.").

21 ³⁶ El-Gamal Decl., Ex. 6, at 2.

22 ³⁷ El-Gamal Decl., Ex. 7, at 2.

23 ³⁸ El-Gamal Decl., Ex. 7 at 1-2.

24 ³⁹ El-Gamal Decl., Ex. 7, 8, 9, 10. Defendants are continuing to coordinate with Avocent and
 25 Raritan the production of these litigation materials. As such, if new prior art references are
 26 discovered, Defendants may seek appropriate leave to amend. Of particular interest is
 27 invalidity contentions from the *Raritan II* litigation and analysis of a prior art KeyView
 28 device alone and in combination with prior art matrix switch devices. Avocent has
 represented that it does not have a sample of this device but has directed Defendants to
 Raritan. Defendants are working with Raritan to inspect the Raritan device and anticipate
 that they may update their contentions thereafter. Based on documentation from other cases,
 the prior art KeyView device was well known to Avocent and its predecessors Apex and
 Cybex for over a decade. Unfortunately, because it is very old, Defendants have had
 difficulty locating a prior art version of this device to inspect and analyze it.

1 supplementing their invalidity contentions.⁴⁰ Accordingly, a denial of leave to amend at this
2 early stage in the case would only reward Avocent for its failure to produce highly-relevant
3 discovery and compound the prejudice on Defendants.

4 **IV. CONCLUSION**

5 For the reasons stated, Defendants respectfully requests that the Court enter an Order
6 granting Defendants' Motion for Leave to Amend Invalidity Contentions.

7 DATED: December 1, 2011

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40 El-Gamal Decl., Ex. 4.

1 DATED: December 1, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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